

a

SINNATHAMBY KLONDAKOUNDAN & ORS

v.

BRIJKISHORE SHUPARSHAD

b

COURT OF APPEAL MALAYA, KUALA LUMPUR
SITI NORMA YAAKOB JCA
MAHADEV SHANKAR JCA
DENIS ONG JCA
[CIVIL APPEAL NO: T-02-100-1996]
7 OCTOBER 1997

c

PARTNERSHIP: *Partnership property - Agreement to purchase land - Evidence of partnership - Whether joint venture amounts to a partnership - Partnership Act 1961, ss. 4, 34(1)(a)*

d

On 7 October 1977, one Lee Chooi Ying ('LCY') entered into a sale and purchase agreement ('SPA1') with the respondent ('BS') and one SS in respect of Lot 24. A deposit was paid and the balance of the purchase price was to be paid to a firm of solicitors as stakeholders. It was expressly stipulated in SPA1 that the agreement was subject to the written consent of the Ruler-in-Council being obtained for the transfer of Lot 24 to BS & SS and, in the event consent was refused, SPA1 shall determine upon the refund of the deposit by LCY to BS & SS. On the same day, LCY also entered into another similar sale and purchase agreement ('SPA2') with the 1st appellant ('SK') and the 4th appellant ('MS') in respect of Lot 23. The deposits and the balance of the purchase prices were separately paid by BS & SS and SK & MS for their respective lots.

*e**f*

A preliminary drawing for a proposed five-storey building on Lots 23 and 24 was purportedly prepared for submission to the Pengarah Tanah dan Galian for consent to the transfer, but this drawing was never submitted before 9 May 1980. On 9 May 1980, the Pengarah Tanah dan Galian wrote to LCY informing the latter that her application for consent to transfer Lots 23 and 24 had been refused by the state authority. LCY then terminated both SPA1 and SPA2 and refunded the moneys with interest to BS and SK respectively. BS and SK then individually deposited the moneys in a time deposit account with a bank.

*g**h*

SK & MS then appealed to the state authority and, on 26 January 1985, the Ruler-in-Council gave its consent for the transfer of Lot 23 to SK & MS. Consent was also given for the transfer of Lot 24 to BS. SK & MS and BS then respectively filed an action against LCY for specific performance but their writs of summons and statements of claim were struck out by the High Court

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and judgment was entered for LCY. SK's appeal to the Supreme Court against the decision of the High Court was also dismissed. *a*

On 23 August 1988, LCY entered into a sale and purchase agreement with Woo Brothers Development Sdn Bhd ('Woo Brothers') for the sale of Lots 23 and 24. Following this SK, BS and a representative of Woo Brothers ('Woo') met to negotiate the purchase of Lots 23 and 24 together with two units of shophouses to be constructed thereon. *b*

On 8 December 1988 BS left for India and on 8 February 1989 Woo Brothers entered into a sale and purchase agreement with MS and the 2nd, 3rd, 5th and 6th appellants for the sale and purchase of Lots 23 and 24 complete with the two units of four-storey shophouses to be constructed thereon. SK signed the sale and purchase agreement for the 2nd to 6th appellants. *c*

On 1 August 1989, after having returned from India, BS instituted a writ action against SK and the 2nd to 6th appellants claiming: firstly, a declaration that he and SK were partners, an order for the dissolution of the partnership, the winding up of the partnership affairs, and that Lot 24 be vested in him; secondly, a declaration that the appellants were trustees for him in respect of Lot 24; and thirdly, damages for breach of trust or alternatively damages for breach of duty as agent of BS. *d*

The High Court gave an oral decision in favour of BS in the terms prayed for. The instant appeal was against this decision of the High Court. The issues before the instant court were: (i) whether the understanding and arrangements between BS and SK constituted a joint venture; and (ii) whether such joint venture was a partnership under the Partnership Act 1961 ('the Act'). *e*

Held:
Per Denis Ong JCA *f*

[1] There is a distinction between a joint venture and a partnership; a joint venture may **or** may not be a partnership. In deciding whether a partnership exists, the court must have regard to the relevant rules in s. 4 of the Act and the intention of the parties as is appears from the whole facts of the case as well as the contract the joint venture parties made. *g*

[2] There was no documentary evidence to establish the existence of a joint venture partnership between BS and SK in 1977 or that it was the business of such to acquire Lots 23 and 24 for development. On the contrary, SPA1, SPA2 and the existing facts showed that the sale and purchase transactions for Lots 23 and 24 were separate and did not relate to each other. *h*

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- a* [3] When the agreements were terminated by LCY following the refusal of the state authority to consent to the transfer of the two lots, the purchase prices plus interest earned were refunded to BS and SK individually. With the refund, SK, MS and BS ceased to have any beneficial interests in Lots 23 and 24, and LCY ceased to be a trustee and became the sole legal and beneficial owner of both lots. Each of the purchasers then separately and individually invested the moneys in fixed deposits. From the conduct and actions of BS and SK pertaining to SPA1 and SPA2 before and after their termination, it was plain and obvious that BS intended to purchase Lot 24 for himself and SS, and likewise in the case of SK & MS in respect of Lot 23. There was no element of any joint intention on the part of BS and SK to purchase Lots 23 and 24 together as joint venturers or as partners in 1977.
- b*
- c*
- d* [4] The joint venture enterprise for the building of the five-storey shophouse on Lots 23 and 24 was a transaction not contemporaneous with SPA1 and SPA2 but subsequent thereto; such joint venture could only have commenced with effect from 8 April 1978 and was also subject to the consent of the state authority. Since such consent was refused and by the decision conveyed to LCY, BS and SK, the condition precedent was unfulfilled and LCY was entitled to treat SPA1 and SPA2 as having come to an end. LCY formally terminated them and refunded the purchase prices in full to BS and SK. The termination of SPA1 and SPA2 also meant the termination of the joint venture to build the said shophouses.
- e*
- f* [5] When the appeal to the state authority was made, both BS and SK were already without any beneficial interests in Lots 23 and 24 following the termination of SPA1 and SPA2 and the full refund of the purchase prices to them. Further, such appeal was made without any mandate or authorisation from LCY who was the sole legal and equitable owner. Consequently, when such consent was obtained on 26 January 1985, it was not binding on LCY and neither SPA1, SPA2 nor the joint venture was revived thereby.
- g*

[Appeal allowed with costs.]

[Bahasa Malaysia Translation of Headnotes]

- h* **PERKONGSIAN:** Hartanah perkongsian - Perjanjian untuk membeli tanah - Keterangan perkongsian - Samada usahasama membawa kepada perkongsian - Akta Perkongsian 1961, ss. 4, 34(1)(a)

- i* Pada 7 Oktober 1997, seorang bernama Lee Chooi Ying ('LCY') telah memasuki satu perjanjian jual beli ('SPA1') dengan responden ('BS') dan seorang bernama SS berhubung dengan Lot 24. Wang deposit telah dibayar

dan baki harga belian hendaklah dibayar kepada sebuah firma peguamcara yang bertindak sebagai pemegang stake. Telah ditetapkan dengan nyata dalam SPA1 bahawa perjanjian itu adalah tertakluk kepada persetujuan bertulis Raja dalam Mesyuarat diperolehi bagi pemindahan Lot 24 kepada BS dan SS dan, sekiranya persetujuan ditolak, SPA akan menentukan pembayaran balik deposit oleh LCY kepada BS dan SS. Pada hari yang sama, LCY telah juga memasuki satu perjanjian jual beli yang serupa ('SPA2') dengan perayu pertama ('SK') dan perayu Ke-4 ('MS') berhubung dengan Lot 23. Deposit-deposit serta baki harga belian telah dibayar secara berasingan oleh BS & SS dan SK & MS bagi lot mereka masing-masingnya.

Satu lukisan awal bagi cadangan bangunan hotel/membeli-belah setingga lima tingkat di atas Lot 23 and 24 yang mempunyai tandatangan kedua-duanya BS dan SK telah dikatakan disediakan untuk pengemukakan kepada Pengarah Tanah dan Galian untuk persetujuan bagi pemindahan itu, namun begitu, lukisan ini telah tidak pernah dikemukakan sebelum 9 Mei 1980. Pada 9 Mei 1980, Pengarah Tanah dan Galian telah menulis kepada LCY memaklumkan bahawa permohonannya untuk persetujuan bagi memindahkan Lot-Lot 23 dan 24 telah ditolak oleh pihak berkuasa negeri. LCY kemudiannya telah menamatkan kedua-duanya SPA1 dan SPA2 dan mengembalikan wang tersebut bersama-sama faedah kepada BS dan KS masing-masingnya. BS dan SK kemudiannya secara sendirian (atas nama mereka sendiri) telah menandatangani wang tersebut dalam satu akaun simpanan tetap di sebuah bank.

SK/MS kemudiannya telah membuat rayuan kepada Pihak Berkuasa Negeri dan pada 26 Januari 1985, Raja dalam Mesyuarat telah memberikan persetujuannya bagi pemindahan Lot 23 kepada SK/MS. Persetujuan telah juga diberikan bagi pemindahan Lot 24 kepada BS. SK/MS dan BS masing-masingnya telah kemudiannya memfailkan satu tindakan terhadap LCY bagi pelaksanaan spesifik SPA mereka tetapi writ saman dan pernyataan Tuntutan mereka telah dibatalkan oleh Mahkamah Tinggi dan penghakiman telah dimasukkan untuk LCY bagi kos dan gantirugi. Rayuan SK kepada Mahkamah Agong terhadap keputusan Mahkamah Tinggi telah juga ditolak dengan kos. Kedua-duanya SK dan BS telah menjelaskan kepada LCY jumlah penghakiman daripada perbelanjaan mereka sendiri secara individu dan juga menjelaskan fee guaman mereka secara individu juga.

Pada 23 Ogos 1988, LCY telah memasuki satu perjanjian jual beli dengan Woo Brothers Development Sdn Bhd. ('Woo Brothers') bagi penjualan Lot 23 dan 24. Berikutan dengan hal ini SK, BS dan seorang wakil Woo Brothers ('Woo') telah berjumpa untuk merundingkan pembelian Lot-Lot 23 dan 24 bersama-sama dengan dua unit rumah kedai untuk dibina di atasnya. Di mesyuarat tersebut SK memberitahu Woo bahawa beliau berminat untuk membeli kedua-

- a* dua unit tetapi BS tidak pernah menyatakan kepada Woo bahawa beliau hendak membeli mana-mana unit.

- b* Pada 8 Disember 1988, BS telah bertolak ke India dan pada 8 Februari 1989 Woo Brothers telah memasuki satu perjanjian jualbeli dengan MS dan perayu-perayu ke-2, ke-3, ke-5 dan ke-6 untuk penjualan dan pembelian Lot 23 dan 24 bersama-sama dengan dua unit rumah kedai empat tingkat yang hendak dibina di atasnya. SK telah menandatangani perjanjian jual beli tersebut sebagai peguam bagi pihak perayu-perayu ke-2 hingga ke-6.

- c* Pada 1 Ogos 1989 selepas kembali dari India, BS telah memulakan satu tindakan terhadap SK dan perayu-perayu ke-2 hingga ke-6 dengan menuntut pertamanya, satu pengisytiharan bahawa beliau dan SK merupakan rakan kongsi, satu perintah untuk pembubaran perkongsian itu, penggulungan hal-ehwal perkongsian itu, akaun dan siasatan-siasatan, bahawa Lot 24 hendaklah diletakhak kepadanya; keduanya, satu pengisytiharan bahawa perayu-perayu adalah pemegang-pemegang amanah bagi beliau berhubung dengan Lot 24 dan ketiganya, gantirugi bagi kemungkiran amanah secara alternatifnya gantirugi bagi kemungkiran kewajipan sebagai ejen BS, faedah dan kos.

- e* Mahkamah Tinggi telah memberikan keputusan lisan yang memihak kepada BS sepertimana yang dipohon dalam pernyataan tuntutan beliau. Kes semasa ini merupakan satu rayuan terhadap keputusan Mahkamah Tinggi ini. Isu-isu yang terdapat di hadapan mahkamah adalah: (i) samada persefahaman dan persetujuan antara BS dan SK membentuk satu usahasama; dan (ii) samada usahasama yang sedemikian merupakan satu perkongsian di bawah peruntukan-peruntukan Akta perkongsian 1961 ('Akta 135').

- f* **Diputuskan:**
Oleh Denis Ong HMR

- g* [1] Terdapat satu perbezaan antara suatu usahasama dan suatu perkongsian. Bahawa sesuatu usahasama mungkin ataupun tidak mungkin merupakan suatu perkongsian dan bahawa dalam memutuskan samada wujud atau pun tidak suatu perkongsian, mahkamah mestilah memberi perhatian kepada kaedah-kaedah yang relevan dalam s. 4 Akta 135, dan niat pihak-pihak tersebut sepertimana yang kelihatan daripada keseluruhan fakta-fakta kes tersebut dan kontrak yang telah dibuat oleh pengusaha-pengusaha sama tersebut.

- h* [2] Tidak terdapat keterangan dokumentari bagi menetapkan wujudnya satu perkongsian usahasama antara BS dan SK dalam tahun 1977 atau bahawa ianya merupakan usaha mereka sedemikian untuk memperolehi Lot-lot 23 dan 24 untuk pembangunan. Bertentangan dengan itu, SPA1 dan SPA2
- i* dan fakta-fakta yang wujud menunjukkan bahawa transaksi jualbeli bagi

Lot-Lot 23 dan 24 adalah berasingan dan tidak ada perkaitan sama sekali antara satu dengan yang lain. *a*

[3] Apabila SPA tersebut ditamatkan oleh LCY berikutan dengan penolakan Pihak Berkuasa Negeri untuk memberi persetujuan kepada pemindah kedua-dua lot, harta belian berserta faedah yang diperolehi telah dibayar balik kepada BS dan SK secara individu. Dengan pembayaran balik itu, SK, MS dan BS tidak lagi mempunyai kepentingan benefisial dalam Lot 23 dan 24 dan LCY tidak lagi menjadi pemegang amanah dan menjadi pemilik benefisial tunggal yang sah kedua-dua lot tersebut. Setiap satu pembeli-pembeli tersebut kemudiannya secara berasingan dan secara individu telah meletakkan wang tersebut ke dalam simpanan tetap. Daripada perlakuan dan tindakan-tindakan BK dan SK berhubung dengan SPA1 dan SPA2 sebelum dan selepas penamatan mereka, adalah jelas dan ketara bahawa BS berniat untuk membeli Lot 24 bagi dirinya sendiri dan SS dan begitu juga keadaan dengan SK dan MS berhubung dengan Lot 23. Tidak terdapat apa-apa unsur mengenai sebarang niat bersama di pihak BS dan SK untuk membeli Lot 23 dan 24 bersama-sama sebagai pengusaha-pengusaha bersama atau sebagai rakan-rakan kongsi dalam tahun 1977. *b*
c
d

[4] Usahasama bagi pembinaan sebuah rumah kedai bersama hotel setinggi 5 tingkat di atas Lot 23 dan 24 merupakan satu transaksi yang tidak serentak dengan SPA1 dan SPA2 tetapi berikutan dengan hal itu dan usahasama yang sedemikian hanya boleh bermula berkuatkuasa daripada 8 April 1978 dan juga tertakluk kepada persetujuan Pihak Berkuasa Negeri untuk memindahkan Lot 23 dan 24 kepada mereka kerana transaksi jual beli dan pindahmilik di bawah SPA1 dan SPA2 itu sendiri adalah tertakluk kepada syarat duluan bahawa persetujuan atau kebenaran Pihak Berkuasa Negeri mestilah diperolehi. Oleh kerana persetujuan yang sedemikian telah ditolak dan menurut keputusan yang disampaikan kepada LCY, BS dan SK syarat duluan itu telah tidak dipenuhi, LCY adalah berhak untuk menganggapkan SPA1 dan SPA2 sebagai telah tamat. LCY telah dengan rasmi menamatkannya dan membayar balik harga belian dengan penuh kepada BS dan SK. Penamatan SPA1 dan SPA2 juga bermakna penamatan usahasama untuk membina sebuah rumah kedai bersama hotel setinggi 5 tingkat di atas Lot 23 dan 24. *e*
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[5] Ketika rayuan dibuat kepada Pihak Berkuasa Negeri, kedua-duanya BS dan SK tidak lagi mempunyai kepentingan benefisial dalam Lot 23 dan 24 berikutan dengan penamatan SPA1 dan SPA2 dan pembayaran balik sepenuhnya harga-harga belian tersebut kepada mereka. Selanjutnya, rayuan yang sedemikian telah dibuat tanpa sebarang mandat atau kebenaran *h*
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- a* daripada LCY yang merupakan tuanpunya tunggal yang sah dan saksama Lot-Lot itu. Akibatnya, apabila persetujuan yang sedemikian diperolehi pada 26 Januari 1985, ianya tidak mengikat LCY mahupun SPA1 dan SPA2 serta usahasama itu juga telah tidak dihidupkan semula olehnya.

- b* [Rayuan dibenarkan dengan kos.]

Cases referred to:

Chooi Siew Cheong v. Lucky Height Development Sdn Bhd [1995] 1 MLJ 513 (*refd*)
Shell Malaysia Trading Sdn Bhd v. Lim Yee Teck & Ors [1982] 2 MLJ 181 (*cit*)

Legislation referred to:

- c* Partnership Act 1961, ss. 4, 34(1)(a)

Other sources referred to:

The Law of Partnership in Australia and New Zealand, Higgins & Fletcher, 1996, 7th edn, p 90

- d* For the appellants - *Raja Aziz Addruse; M/s Liza Chan & Co*
For the respondent - *SM Appadurai (Vendargon with him); M/s Vendargon & Partners*

JUDGMENT

- e* **Denis Ong JCA:**

This is an appeal by the defendants (appellants) in the action against the whole decision of the High Court given on 4 February 1996 in favour of the plaintiff (respondent).

- f* The facts and circumstances giving rise to this action are as follows: the registered proprietor of Lots 23 and 24, Section 3, Village of Brinchang District of Cameron Highlands (hereafter referred to as "Lot 23" and "Lot 24" respectively) was one Lee Chooi Ying (LCY). Both Lots were subject to the same title condition namely, no dealing therewith without first obtaining the written consent of the Ruler-in-Council. On 7 October 1977, LCY entered into a Sale and Purchase Agreement (SPA(1)) with Brijkishore a/l Shuparshad the respondent (BS) and another named Shriniwas a/l Shuparshad (SS) for the sale and purchase of Lot 24 for a consideration of RM45,500; RM5,000 to be deposited forthwith and the balance of RM40,500 to be paid to M/s Yeap & Yeap (advocates & solicitors) as stakeholders not later than 2 April 1978. The date of completion of the sale was of the essence of the contract as stipulated by cl. 10 or sooner if the consent in writing of the Ruler in Council to the transfer was obtained earlier. It was expressly stipulated as a condition in SPA(1) that the agreement therein was subject to the written consent of the Ruler-in-Council for the transfer of Lot 24 to BS and SS and by cl. 3 of
- g*
- h*
- i*

SPA(1), it was the responsibility of LCY to apply for such consent promptly. Under cl. 9, it was provided that SPA(1) shall be determined upon receipt by LCY of the notification of refusal of such consent by the Ruler-in-Council and upon refund by LCY of the RM5,000 deposit to BS and SS. On the same date ie, 7 October 1977, and separately, LCY also entered into another sale and purchase agreement (SPA(2)), this time with Sinnathamby a/l Klondakoundan (SK) the 1st appellant and Mohan a/l Sinnathamby (MS) the 4th appellant for the sale and purchase of Lot 23 for the same amount of consideration ie, RM45,500 and on exactly the same terms and conditions as in SPA(1) including the consent of the Ruler-in-Council to the transfer of Lot 23 to SK and MS. The same firm of advocates and solicitors namely, M/s. Yeap & Yeap acted for both Vendor and Purchasers in SPA(1) and SPA(2) and also as stakeholders.

In accordance with the terms of SPA(2), SK and MS on their own paid to M/s. Yeap & Yeap as stakeholders the full sum of the consideration, initially on 30 September 1977 by way of deposit and subsequently on 18 April 1978 the balance of the purchase price and these payments were received into the client account of M/s. Yeap & Yeap. The professional charges totalling RM139.50 pertaining to SPA(2) were also settled by SK and MS. These payments were documented at pp. 366 to 369 of the Appeal Record. In the case of SPA(1), there was no documentary evidence of such like payments in the Appeal Record although it was not disputed that BS and SS made exactly the same payments to M/s Yeap & Yeap.

On 4 October 1977, M/s. Yeap & Yeap wrote to SK requesting the latter to fill in the particulars of himself and MS required by the application forms for the consent of the Ruler-in-Council. A preliminary drawing for a proposed 5-storey shopping cum hotel building on Lots 23 and 24 was sent under cover of a letter dated 8 April 1978 from M/s. Foo & Yee Jurutera Perunding addressed to the names of both BS and SK for their perusal, comment and early instruction. At the foot of the preliminary drawing was a caption which read thus: "PROPOSED FIVE-STOREYED SHOPPING AND HOTEL BUILDING ON LOTS NO. 23 AND 24 TOWNSHIP OF TANAH RATA CAMERON HIGHLANDS FOR M/S.BRIJKISHORE AND K. SINNATHAMBY" and next to it were the signatures of both BS and SK. Although SK disputed the date of the preliminary drawing which BS asserted was 8 April 1978, it was common ground between them that such drawing was never submitted to the Majlis Daerah before 9 May 1980. On 9 May 1980, the Pengarah Tanah dan Galian wrote to LCY to inform that her application for consent to transfer Lot 23 and Lot 24 had been refused by the State Authority. That letter was copied to BS and SK and addressed to No. 18, Brinchang, Cameron Highlands the address of BS. Consequent upon the refusal

- a* of the State Authority LCY terminated both SPA(1) and SPA(2); and M/s. Yeap & Yeap as stakeholders refunded to BS and SK in full the monies they paid plus interest earned. The refund was by way of two separate cheques one to BS and another to SK each of which was to the value of RM50,631.23. Individually, each of them in their own name deposited a sum of RM45,500
- b* in time deposit account from 6 October 1980 to 6 March 1984 with the Hongkong and Shanghai Banking Corporation (HSBC) and such deposit was expressed to be for the purchase of Lot 23 and Lot 24. On 6 March 1984 they withdrew from HSBC and placed their individual deposits of RM45,500 each in Fixed Deposit Placement Accounts with Arab Malaysian Finance
- c* Berhad (AMFB) again in their own individual names and for the same purpose as before, having previously arranged by letter dated 29 March 1983 (appeal record p. 311) with AMFB. The figure of RM50,631.28 in p. 311 was derived from M/s. Yeap & Yeap's letter dated 17 September 1980 at Appeal Record p. 502 which figure included interest earned.
- d* On their own behalves, in their joint names and acting through their solicitors M/s. H.L. Sharma, SK and MS wrote on 18 June 1980 to the Pengarah Tanah dan Galian to enquire if the latter was prepared to reconsider LCY's application for the consent of the Ruler-in-Council to transfer Lot 23 to them. The reply of the Pejabat Tanah dan Galian dated 23 July 1980 was in the
- e* affirmative and on the same day M/s. H.L. Sharma appealed in writing to the pengarah on behalf of their clients and in respect of Lot 23 only. The same solicitors also wrote to LCY informing her of the positive disposition of the Menteri Besar if she put up an appeal. As there was no response from LCY, M/s. H.L. Sharma appealed again on behalf of their said clients to the Pengarah
- f* Tanah dan Galian by letter dated 15 November 1984 (Appeal Record p. 370) enclosing a proposed building plan marked "S" which SK and MS intended to build on Lot 23. The outcome was that consent of the Ruler-in-Council to the transfer of Lot 23 to SK and MS was given by the Menteri Besar Pahang on 26 January 1985 (Appeal Record p. 303). Separately, on the same date, BS was also notified in writing (Appeal Record p. 302) that consent of the
- g* Ruler-in-Council was given by the Menteri Besar Pahang for the transfer of Lot 24 to him.
- As there was no response from LCY regarding the appeal to the Ruler-in-Council, SK and MS filed S/798/82 in the Ipoh High Court against LCY for
- h* specific performance of the contract in SPA(2). On the same date BS also filed a separate action S/799/82 in the Ipoh High Court for specific performance of the contract in SPA(1). LCY defended, counter claimed for damages and applied to the court to strike out both actions and also for judgment in respect of damages to be assessed against SK and MS and also
- i* against BS. The interlocutory application in S/798/82 was heard and on

23 September 1985, the court ordered the writ of summons and statement of claim to be struck out and judgment be entered for LCY in respect of her counterclaim and for damages to be assessed and for costs of the action. SK appealed to the Supreme Court in Supreme Court Appeal No. 31/86 against the order of the High Court and on 8 July 1986, the Supreme Court dismissed the appeal with costs. a

On 10 December 1986, LCY entered into another Sale and Purchase Agreement (SPA(3)) this time with Woo Brothers Development Sdn. Bhd. (Woo Brothers) for the sale of both Lot 23 and Lot 24 for a total consideration of RM350,000 and the date of completion of sale stipulated to be of the essence of the contract, was 10 December 1987. The contract in SPA(3) was terminated by LCY because Woo Brothers did not pay in time. b

On 12 May 1988 by consent of the parties in S/798/82, the court ordered SK and MS to pay to LCY RM20,000 in full satisfaction of costs and damages in the suit and counterclaim and in Supreme Court Appeal No. 31/86. BS accepted liability for the figure of RM20,000 in full settlement and a like Order was made in S/799/82. Both SK and BS settled with LCY their respective amounts out of their own pockets individually. N. Selvarajah acted as counsel for both SK and BS at the hearing on 12 May 1988 before the Senior Assistant Registrar, on the authority of M/s. H.L. Sharma (Appeal Record pp. 408 and 476) and counsel's fees were settled by each of them individually. S.M. Ching appeared as counsel mentioning on behalf of LCY's solicitors. S.M. Ching was also the daughter-in-law of LCY. On the same day at the courthouse in Ipoh, the topic of sale and purchase of Lot 23 and Lot 24 was brought up afresh in the presence of both counsel and also in the presence of SK and BS. It was common ground that if SK and BS wanted to purchase Lot 23 and Lot 24 as vacant Lots again, LCY was not minded to sell to them; as a result, nothing fruitful came out of that meeting. c

On 23 August 1988, LCY entered into yet another Sale and Purchase Agreement (SPA(4)) with Woo Brothers for the sale of the same Lot 23 and Lot 24 for a total consideration of RM300,000. The date of completion of the sale was 23 May 1989 which was stipulated to be of the essence of the contract. d

On 24 November 1988, by appointment with N. Selvarajah, SK, BS and Woo Kai Hong of Woo Brothers met N. Selvarajah at his office for negotiation about the purchase of Lot 23 and Lot 24 together with two units of shophouses about to be constructed. In that meeting, Woo Kai Hong made an offer to sell each unit at RM400,000. None of them agreed to buy at that price. SK made known to Woo Kai Hong that he was interested to purchase both units but BS never said to Woo Kai Hong that he wanted to buy any unit. e

- a* On 8 December 1988, BS left for India; on 8 February 1989 Woo Brothers entered into a Sale and Purchase Agreement (SPA(5)) with MS and the 2nd, 3rd, 5th and 6th appellants for the sale and purchase of Lot 23 and Lot 24 complete with the two units of four storey shophouses to be constructed thereon for a total purchase price of RM800,000. SK signed SPA(5) as attorney
- b* for 2nd to 6th appellants, the purchasers who were his family members. BS returned from India on 10 February 1989.

- c* On 1 August 1989, BS instituted a writ action against SK and the 2nd to 6th appellants claiming firstly, a declaration that he and SK were partners, an order for dissolution of the partnership, winding up of the partnership affairs, accounts and enquiries, that Lot 24 be vested in him and that the appellants or such of them do execute all acts and assurances to give effect to his rights so declared; and secondly, a declaration that the appellants or such of them were trustees for him in respect of Lot 24 subject to payment by him of all costs, charges and expenses incurred; thirdly, damages for breach of trust
- d* alternatively, damages for breach of duty as agent/agents of BS, interest and costs.

- e* The action came on for trial proper on 30 November 1991 where oral evidence was heard from both sides in addition to affidavit evidence filed and on 4 February 1996 the High Court gave an oral decision in favour of BS in terms prayed for in the statement of claim. A copy of the judgment was to be found at Rekod Rayuan Tambahan (Kedua) p. 1 and the grounds of judgment dated 29 March 1996 was filed separately in Rekod Rayuan Tambahan Bahagian "A".

- f* At the hearing of this appeal, arguments from both sides centred on the primary question of whether the relation between BS and SK constituted a joint venture partnership. Learned counsel for the appellants who included SK submitted firstly, that there was no joint venture agreement or partnership; at best there was only an agreement to build a hotel on Lot 23 and Lot 24; and
- g* secondly, even if there was agreement to build a hotel, such an agreement was frustrated and terminated because the consent of the Ruler-in-Council was refused, Woo Brothers had bought over Lot 23 and Lot 24, and that Woo Brothers had subsequently offered both Lots for sale to the public. Learned counsel for BS submitted that in law and in equity SK and BS were partners
- h* for a single adventure and for profit, and that Lot 23 and Lot 24 purchased in the names of the 2nd to 6th appellants (who were the immediate family members of the 1st appellant) were a joint venture partnership asset.

- i* It is a fact that there was no joint venture agreement or a partnership agreement in writing between BS and SK. The issues raised by the first submission of learned counsel for the appellants are (a) whether the

understanding and arrangements between BS and SK constituted a joint venture and (b) whether such joint venture was a partnership under the provisions of the Partnership Act 1961 (Act 135). It is more or less accepted that there is a distinction between a joint venture and a partnership; that a joint venture may or may not be a partnership and that in deciding whether or not a partnership existed, the court must have regard to the relevant rules in s. 4 of Act 135 and the intention of the parties as appearing from the whole facts of the case and the contract the joint venturers had made: *Chooi Siew Cheong v. Lucky Height Development Sdn. Bhd.* [1995] 1 MLJ 513 (FC) at p. 521 D-F; 522 A-D. That was a case where there was a joint venture agreement in writing and one of the questions for the court's decision was whether the joint venture project was a partnership under Act 135. Higgins and Fletcher – *The Law of Partnership in Australia and New Zealand* 7th Edn (1996) at p. 90 stated the law thus:

Whether, in the absence of an express agreement, a partnership contract can be inferred from the conduct of the parties is purely a question of fact depending upon the joint and not the individual intention of the parties. The intention is not to be determined by an examination of the private intention of each party but is to be ascertained by inference from their conduct and actions, throughout the whole course of their dealings with each other. As the ascertainment of a joint intention is a question of fact, a determination by a trial judge or jury will not normally be subject to review by an appellate court.

Of the two issues raised by the first submission of learned counsel for the appellants, little (if at all) was canvassed by learned counsel on both sides on the first issue in their submissions before the trial court although “joint venture partnership” was specifically averred in paras. 4 and 9 of the statement of claim as the basis by which BS and SK became partners which averments were specifically denied in para. 5 of the defence. It would appear from the submissions of both learned counsel that both sides accepted without argument that the arrangement and the understanding between BS and SK constituted a joint venture agreement between them notwithstanding that there was no such agreement in writing. In the result, both sides concentrated their arguments on the second issue which the trial court dealt with.

In the premises we approached this appeal on the footing that in the state of affairs which existed between BS and SK, the association between them was one of joint venturers. Indeed, that seemed to be the approach of the trial court from its grounds of judgment. The next issue was whether they were to be regarded as partners. That status could only be determined if the joint venture between them constituted a partnership “for a single adventure or undertaking” subsumable under s. 34(1)(a) of Act 135.

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a As we understood it, the mainstay of BS's argument both here and in the trial court for the existence of a partnership between him and SK were:

(i) The preliminary drawing of a proposed 5-storey shopping cum hotel building on Lot 23 and Lot 24 and M/s Foo and Yee's letter dated 8 April 1978;

b (ii) the plan of shophouses which Woo Brothers proposed to construct on Lot 23 and Lot 24 and,

c (iii) the meeting on 24 November 1988 at the law office of N. Selvarajah between Woo Kai Hong, SK, BS and N. Selvarajah.

d It was a fact that the preliminary drawing in (i) was signed by both BS and SK. What SK disputed was the purpose for which it was intended to be used and the date it was prepared. According to his evidence, the drawing was intended to be used to bolster their individual appeals dated 15 November 1984 to the Pengarah Tanah dan Galian Pahang against the State Authority's refusal of consent to transfer Lot 23 and Lot 24 from LCY to SK and MS and also to BS and SS in pursuance of SPA(2) and SPA(1) respectively which refusal was conveyed to them by a copy letter dated 9 May 1980 from the Pengarah Tanah dan Galian Pahang to LCY. BS on the other hand, asserted in evidence *e* that the drawing was prepared on 9 April 1978 for submission to the District Council although not submitted to the Council in 1978 because at that time Lot 23 and Lot 24 had as yet to be transferred to them. The trial court preferred the oral evidence of BS to that of SK and implicitly accepted for a fact that it was more probable and reasonable that the drawing was prepared *f* on 8 April 1978 and was intended for submission to the District Council after the transfer of Lot 23 and Lot 24 although never so submitted.

As at 8 April 1978, the proposed transfer of Lot 23 to BS and SS and Lot 24 to SK and MS under SPA(1) and SPA(2) depended on the fulfillment of two conditions:

g (a) Settlement by them of the balance of the purchase price for Lot 23 and Lot 24 in the sum of RM40,500 each. Under SPA(1) and SPA(2) such balances were due on 2 April 1978. They were paid to M/s Yeap & Yeap in the case of SK on 18 April 1978 ten days after the preliminary drawing was prepared and in the case of BS, no date of payment was known. *h*

(b) The consent of the State Authority of Pahang. From M/s Yeap & Yeap's letter at p. 365 of the Rekod Rayuan (Bahagian C) it was evident that as early as 4 October 1977 even before SPA(1) and SPA(2) were executed, they made prompt preparations for LCY's application for such consent. *i* There was no dispute that on her part LCY submitted the application for consent, however, as at 8 April 1978 LCY, BS and SK had yet to

(c) ... *a*

(d) ...

(e) be informed by the State Authority of the outcome of that application.

Thus, although condition (a) was not fulfilled on 8 April 1978, it was fulfilled belatedly. But condition (b) was not fulfilled as at 8 April 1978. *b*

In as much as it was represented in the drawing that the 5-storey building proposed to be built on Lot 23 and Lot 24 as one building with a common main entrance as Mr. Appaduray rightly pointed out and that such building was expressly for M/s Dato Brijkishore (BS) and K. Sinnathamby (SK) both of whom signed on such drawing, in our opinion the only fair and reasonable inference of fact that could be drawn therefrom was that it was a joint proposal by BS and SK to erect that building on Lot 23 and Lot 24 if the State Authority consented to the transfer of Lot 23 to BS and SS and Lot 24 to SK and MS in pursuance of SPA(1) and SPA(2). That joint proposal represented a joint venture or undertaking for which agreement was reached on 8 April 1978 between BS and SK. *c*
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BS however, claimed that he and SK became partners in a joint venture partnership in 1977 and that such partnership related to the purchase of Lot 23 and Lot 24 with a view to their development. He alleged that the terms of such partnership orally agreed between them were: *e*

(a) that Lot 23 to be registered in the joint names of SK and his nominee and Lot 24 to be registered in the name of BS; and

(b) that the costs, charges and expenses incurred and the profits from the joint venture partnership were to be shared and apportioned between them. *f*

BS stated in evidence that the transactions in SPA(1) and SPA(2), the payments made thereunder including legal fees and expenses were what they orally agreed in (a) and (b) above. He reasoned firstly, that Lot 23 and Lot 24 were two separate Lots and in the event that anything should happen to them, each one would know which Lot belonged to him which partly accounted for bringing in SS and MS into SPA(1) and SPA(2). *g*

Secondly, he said that the payments were to be regarded as the half share each contributed. Lastly, he said that from the standpoint of finance, they would be able to secure more finance for the shopping cum hotel project. SK on the other hand, denied that there was at any time any agreement oral or otherwise between him and BS to enter into a joint venture partnership for the acquisition and development of Lot 23 and Lot 24. He maintained that the transactions in SPA(1) and SPA(2) were separate and distinct and that each one paid for his own Lot. *h*
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- a* It did not appear from the grounds of judgment of the trial court that it had canvassed the dispute as to the existence or otherwise of a joint venture partnership between BS and SK in 1977, whether it was the business of such partnership to acquire Lot 23 and Lot 24 for development and the significance of the requisite consent to the transfer of the State Authority to the validity of SPA(1) and SPA(2). The starting point of its discussion of the evidence was the preliminary drawing which it accepted was prepared on 8 April 1978. Consequently, in para. 7(d) of the grounds of judgment, when it drew an inference of fact from the actions of BS and SK that there was a joint venture partnership between them from the beginning, it could only have meant from 8 April 1978.
- c* There was no documentary evidence to establish the existence of a joint venture partnership between BS and SK in 1977 or that it was the business of such partnership to acquire Lot 23 and Lot 24 for development. On the contrary SPA(1) and SPA(2) showed that the sale and purchase transactions for Lot 23 and Lot 24 were separate and did not relate to one another. Under SPA(2) the purchasers were SK and MS and the land the subject matter of the purchase was Lot 23. Under SPA(1) the purchasers were BS and SS and the land the subject matter of the purchase was Lot 24. Under SPA(1) and SPA(2) the purchasers had to pay a deposit of RM5000 in 1977 which they did and out of their pockets separately. On 18 April 1978, which was ten days after they both signed the preliminary drawing signifying their agreement to the joint venture to build a 5-storey hotel cum shophouses, SK and BS continued to pay the balance of RM40,500 out of their pockets separately. Until the transfer, the only persons who had a beneficial interest in Lot 23 were SK and MS in equal shares. Likewise, the only persons who had a beneficial interest in Lot 24 were BS and SS also in equal shares. In both instances LCY the vendor was the trustee. BS and SS had no interest in Lot 23; and SK and MS had no interest whatever in Lot 24. When LCY terminated SPA(1) and SPA(2) following refusal of the State Authority by letter dated 9 May 1980, the purchase prices were refunded in full by M/s Yeap and Yeap plus interest earned to BS and SK individually on 17 September 1980. With the refund SK, MS, and BS ceased to have any beneficial interest in Lot 23 and Lot 24 and LCY ceased to be a trustee so that on 17 September 1980 LCY was once again the sole legal and beneficial owner of both Lots. Each of them separately and individually invested the monies in fixed deposits initially with HSBC and subsequently with AMFB. From the conduct and actions of BS and SK pertaining to SPA(1) and SPA(2) before and after their termination, it was plain and obvious to us that BS intended to purchase Lot 24 for himself and SS and likewise in the case of SK and MS in respect of Lot 23. There was no element of any joint intention on the part of BS and SK to purchase Lot 23 and Lot 24 together as joint venturers or as partners in 1977.
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BS gave three reasons to justify their conduct and actions which reasons we had mentioned earlier. If the partnership was already in existence in 1977 and the first reason was genuine, it would clearly be a departure from regarding Lot 23 and Lot 24 as partnership property common to both. If the second reason was genuine, then Lot 23 and Lot 24 were intended as partnership property with each partner holding equal shares in Lot 23 and Lot 24. Only one Sale and Purchase Agreement would have been necessary between LCY (as vendor) and BS and SK (jointly as purchasers) and there would have been no reason whatever to bring in SS and MS as purchasers. They did not contribute towards the payment and were never intended to be partners or joint venturers. Further, if the monies for purchasing Lot 23 and Lot 24 were share contributions from BS and SK as partners they should have been paid out of a partnership account and not from their individual pockets. And when they were refunded by M/s Yeap and Yeap, such monies should have been paid into the partnership account. The second reason seemed to be inconsistent in itself and with the first reason. The third reason of BS was not a consideration relevant to the existence of a partnership between him and SK. The matter of finance must relate to some sort of a development plan in existence in 1977; there was no such plan at that time. If there was a plan in 1977, it would have been a plan contemporaneous with SPA(1) and SPA(2) and would have been submitted together with the application form to the State Authority for its consent to transfer. In point of time, the preliminary drawing referred to earlier was prepared on 8 April 1978, six months after SPA(1) and SPA(2) were entered into and six days after 2 April 1978, the date of completion of the sale stipulated in cl. 4 of SPA(1) and SPA(2). Hence the third reason appeared to be irrelevant, speculative and unrealistic. In the premises, it was neither reasonable nor probable to infer a joint venture or a partnership between BS and SK in 1977 for the purchase of Lot 23 and Lot 24 with a view to their development. Based on SPA(1) and SPA(2) respectively, the sole intention of BS was to purchase Lot 24 for himself and SS and the sole intention of SK was to purchase Lot 23 for himself and MS. The joint venture enterprise for the building of a 5-storey hotel cum shophouses on Lot 23 and Lot 24 was a transaction not contemporaneous with SPA(1) and SPA(2) but subsequent thereto and such joint venture could only have commenced with effect from 8 April 1978 and was also subject to the consent of the State Authority to transfer Lot 23 and Lot 24 to them because the sale and purchase transactions and the transfers under SPA(1) and SPA(2) were themselves subject to a condition precedent that the consent of the State Authority be obtained. Since such consent was refused and by the decision conveyed to LCY, BS and SK the condition precedent was unfulfilled, LCY was entitled to treat SPA(1) and SPA(2) as having come to an end: see *Shell Malaysia Trading Sdn. Bhd. v. Lim Yee Teck & Ors.* [1982] 2 MLJ 181 (FC). LCY

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- a* formally terminated them and refunded the purchase price in full to BS and SK through M/s Yeap & Yeap. The termination of SPA(1) and SPA(2) meant also the termination of the joint venture to build a 5-storey hotel cum shophouses on Lot 23 and Lot 24.
- b* Between 18 June 1980 and 8 July 1986, various attempts were made by BS and SK to revive SPA(1) and SPA(2). These included resurrecting with the Pengarah Tanah dan Galian Pahang and LCY the issue of consent of the State Authority to transfer Lot 23 and Lot 24 to BS and SK and actions for specific performance of SPA(1) and SPA(2). When the appeal to the State Authority was made on 15 November 1984, it must be observed that both BS and SK
- c* were already without any beneficial interest in Lot 23 and Lot 24 following the termination of SPA(1) and SPA(2) and the refund in full of the purchase prices to them. Further, such appeal was made without any mandate or authorisation from LCY who was the sole legal and equitable owner of those Lots. Consequently, when such consent was obtained on 26 January 1985, it
- d* was not binding on LCY and neither SPA(1), SPA(2) nor the joint venture was revived thereby. As regards the actions for specific performance, they were struck out by the High Court and appeals therefrom were dismissed by the Supreme Court on 8 July 1986. Four months afterwards, LCY entered into a sale and purchase agreement (SPA(3)) with Woo Brothers by which Woo
- e* Brothers became purchasers of Lot 23 and Lot 24 for a total price of RM350,000. The second and third arguments of BS mentioned earlier were conduct and actions between BS and SK which took place in June, July or August and November, 1988 some eight years after the termination of SPA(1), SPA(2) and the joint venture. Consequently, they were irrelevant for the
- f* purposes of determining the existence of a joint venture or partnership between them. These arguments were advanced in the trial court on the basis that the joint venture partnership was never terminated and continue to exist. As I said earlier the joint venture agreed to orally, came to an end with the termination of SPA(1) and SPA(2) and the refund of the purchase price in full to BS and SK. The acts and conduct referred to arose from a fresh attempt to purchase
- g* Lot 23 and Lot 24 not from LCY but from Woo Brothers. In the premises the trial court erred in taking them into account.

- For the reasons stated, this appeal is allowed with costs here and below. Deposit to be refunded to the appellants. Order accordingly. Although both
- h* sides submitted in this appeal on the question of whether the relationship between BS and SK created an agency in the events that followed from 12 May 1988, the trial court made no decision on that question expressly or by implication. If it did, the sealed Order of court at pp. 1, 2 and 3 of the Rekod Rayuan Tambahan (Kedua) would have expressly incorporated prayer
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(h) of the statement of claim which it did not. Insofar as ground 3 of the Memorandum of Appeal purported to represent that the trial court held/found that the 1st appellant owed a duty to the respondent as an agent/fiduciary arising from the joint venture partnership and in relation to Lot 24, that was in excess of the grounds of judgment. The sole question considered and decided by the trial court was whether or not the relationship between BS and SK constituted a joint venture partnership which it decided in the affirmative. In the premises, ground 3 of the Memorandum of Appeal was unfounded and we decline to decide on it.

Reported by Ling Hea Hoon

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